

REPORT No. 124/10
PETITION 11.990
ADMISSIBILITY
OSCAR ORLANDO BUENO BONNET *ET AL.*
COLOMBIA¹
October 23, 2010

I. SUMMARY

1. On March 9, 1998, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “IACHR”) received a petition lodged by *Humanidad Vigente – Corporación Jurídica* and the *Corporación Colectivo de Abogados “José Alvear Restrepo”* (hereinafter “the petitioners”), in which they allege that the Republic of Colombia (hereinafter “the State” or “the Colombian State”) is responsible for the extrajudicial execution of Oscar Orlando Bueno Bonnet, Jefferson González Oquendo, and Jean Carlo Cavarique—whom they contend was a child—(hereinafter “the alleged victims”), presumably perpetrated by State agents on January 10, 1997 in Saravena, Department of Arauca, and for the lack of diligence on the part of judicial officials in the investigation and punishment of the perpetrators of said acts.

2. The petitioners allege that the State is responsible for violation of the rights to life, humane treatment, a fair trial, and freedom of expression, the rights of the child and the right to judicial protection, established in Articles 4, 5, 8, 13, 19, and 25 of the American Convention on Human Rights (hereinafter “the American Convention”), all in conjunction with the general obligation to respect and guarantee the rights contained in its Article 1(1). They argue that the petition is admissible in view of the exception to exhaustion of domestic remedies in accordance with Article 46(2)(a) of the American Convention, since Colombian legislation does not provide for adequate remedies to protect the violated rights. The State, on the other hand, contends that the petition is inadmissible, due to the failure to exhaust domestic remedies, since there is a pending investigation in the courts of the ordinary criminal jurisdiction.

3. After examining the position of the parties in light of the admissibility requirements stipulated in Articles 46 and 47 of the Convention, the Commission concludes that it is competent to consider the complaint and that it is admissible insofar as it alleges violation of the rights established in Articles 4, 5, 8, 13, 19, and 25 of the American Convention, considered in conjunction with Article 1(1), to the detriment of the alleged victims and their relatives. In addition, by virtue of the principle of *iura novit curia*, the Commission concludes that it is admissible with regard to the possible violation of Article 5 of the American Convention, considered in conjunction with Article 1(1), to the detriment of the family members of the alleged victims. Consequently, it will notify the parties of the report, order its publication, and include it in its Annual Report.

II. PROCEDURES BEFORE THE COMMISSION

4. The IACHR registered the petition as number 11.990 and, following a preliminary analysis, on March 17, 1998 it proceeded to transmit it to the Colombian State, and to grant the State 90 days to submit its observations. On July 16, 1998 and on June 23, 2000, the Commission reiterated its request for observations to the State. On July 27, 2000, the State presented its response, which was forwarded to the petitioners on July 28, 2000, for their observations.

5. On September 5, 2000, the petitioners presented their response, which was forwarded to the State on January 11, 2001, for its observations. On March 5, 2001, the State presented its response,

¹ In accordance with the provisions of Article 17.2 of the Commission’s Rules of Procedure, Commissioner Rodrigo Escobar Gil, a Colombian national, did not participate in the decision on this petition.

which was forwarded to the petitioners for their comments. The petitioners responded on April 19, 2001, and that response was forwarded to the State for its comments.

6. On April 13, 2009, the Commission requested both parties to provide updated information. On June 17, 2009, the petitioners sent their observations, which were forwarded to the State on February 2, 2010, with a deadline of 30 days to submit its observations. On March 2, 2010, the State requested a 30-day extension, which was granted by the Commission on March 4, 2010. On March 30, 2010, the State presented its observations.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

7. The petitioners allege that on January 10, 1997, at approximately 8:30 pm, Oscar Orlando Bueno Bonet, Jean Carlo Cavarique, and Jefferson González Oquendo were traveling through the city of Saravena, Arauca Department, on two motorcycles. They maintain that when they were in front of the "Copetran" Hotel, the alleged victims were intercepted by a National Army patrol attached to the Reveis Pizarro Battalion.

8. They allege that the soldiers began to shoot at the alleged victims, who got off their motorcycles and started to run. The petitioners state that after Oscar Bueno was wounded by one of the soldiers, he continued on approximately 200 meters, when he was shot repeatedly with a rifle, causing his death.

9. The petitioners indicate that Jefferson González was pursued by another soldier along three streets to the yard of a house. They allege that they caught up with him there, where he was shot dead. As for Jean Carlo Cavarique, they allege that he was put against a wall and riddled with bullets by another one of the soldiers.

10. The petitioners contend that on January 14, 1997, Military Criminal Court 124 opened an investigation. They allege that on April 21, 1997, the father and the wife of Oscar Bueno lodged a complaint regarding the murder of the alleged victims by members of the National Armed Forces. They indicate that on May 20, 1997, the Prosecutor's Office of Department 40 [*Fiscalía Seccional 40*] for the Judges of Saraveno Circuit opened a preliminary investigation. They report that the Prosecutor's Office sent the case file to Military Criminal Court of First Instance 124 (hereinafter "Military Criminal Court"), which issued a writ of prohibition on July 24, 1997, on the grounds that "the soldiers involved acted in legitimate self-defense in combat circumstances."²

11. They state that on May 13, 1998, the Military Criminal Court revoked the writ of prohibition and formally opened an investigation against Corporal Carlos Medina, Lieutenant Diego Martínez, and Private Reimond Piñerez for the alleged crime of murder during combat. The petitioners claim that on July 13, 1998, the Public Ministry [*Ministerio Público*] requested the Military Criminal Court to invoke conflict of jurisdiction with the ordinary criminal courts, due to the serious inconsistencies that occurred during the investigation into the alleged acts.

12. The petitioners report that on October 2, 1998, the Military Criminal Court denied the request of the Public Ministry, and referred the case file to the Military Superior Court, which upheld the decision of the Military Criminal Court on April 6, 1999. They indicate that on June 23, 2000, the Military Criminal Court closed the preliminary investigative stage, without issuing a warrant to detain [*medida de aseguramiento*] against the three members of the National Army.

13. However, they allege that on May 28, 1999, the Office of the State Attorney for Human Rights [*Procuraduría Delegada para Derechos Humanos*] opened a disciplinary investigation against the

² Petitioners' brief received on April 29, 2001.

members of the National Army patrol attached to the Reveis Pizarro Battalion. They claim that despite the fact that a list of charges was issued on February 16, 2000, the investigation conducted by the State Attorney for Human Rights was closed on March 15, 2002, due to the statute of limitations. In this regard, the petitioners state that there was no opportunity for the relatives of the alleged victims to testify or participate in the disciplinary proceeding, since they were not allowed to access to the file of the disciplinary investigative proceedings, even when they were requested.

14. The petitioners further claim that on December 18, 1998, the family members of Oscar Bueno and Jefferson González filed complaints with the Adjudicatory Administrative Tribunal of Arauca against the Nation—Ministry of Defense. They maintain that on September 9, 1999, that Tribunal found the Nation—Ministry of Defense to be administratively responsible for the deaths of Oscar Bueno and Jefferson González, at the hands of members of the National Army.

15. The petitioners contend that the decision by the Prosecutor's Office to refer the investigation to a military criminal court was done in disregard for the fact that military acts that constitute human rights violations cannot be considered as acts of service. On this point, they argue that the acts were extrajudicial executions, since the alleged victims, who were unarmed and absolutely defenseless, were attacked, pursued, and murdered by members of the National Army.

16. As to the requirement of prior exhaustion of domestic remedies established in Article 46(1) of the American Convention, the petitioners contend that the procedures in the military criminal court did not constitute an effective remedy of an investigation into human rights violations. They further allege that the military criminal investigation favored impunity, instead of determining liability for the acts. In these circumstances, they allege that the exception to exhaustion of domestic remedies set forth in Article 46(2)(a) applies. In this regard, they allege that the absence of a legal and effective process under domestic law to investigate, try, and punish the persons responsible for these acts allows for the exhaustion of remedies not to be required.

17. The petitioners allege that to date, the State has not conducted an effective investigation into the acts described in this petition, and that it has neither identified, tried, or punished the responsible parties, or determined the truth of the facts.

18. The petitioners allege that the State violated Articles 4 and 5 of the American Convention, considered in conjunction with its Article (1), to the detriment of the alleged victims, as well as Articles 8, 13, and 25 of the American Convention in conjunction with its Article 1(1), to the detriment of the family members of the alleged victims. They further allege that the State violated Article 19, considered in conjunction with Article 1(1) of the American Convention, to the detriment of Jean Carlo Cavarique.

B. Position of the State

19. The State contends that the alleged acts led to prompt proceedings conducted in the country within the ordinary criminal, adjudicatory administrative, and disciplinary jurisdictions. It alleges that on March 5, 2003, the Superior Military Tribunal declared the investigation closed and on February 26, 2007, Military Criminal Prosecutor's Office 20 sent the case file to the Human Rights and International Humanitarian Law Unit in the Office of the National Prosecutor-General [*Fiscalía General de la Nación*] (hereinafter "UNDH"). It points out that on July 23, 2007, the investigation was assigned to Prosecutor's Office 42 of the UNDH, which issued an order to open a prior investigation on July 31, 2007, and which reassigned the investigation to the UNDH's Prosecutor's Office 72 on September 1, 2008.

20. With regard to the disciplinary process, the State reports that on February 16, 2000, the Office of the State Attorney for Disciplinary Matters pertaining to the Defense of Human Rights filed charges against various members of the National Army for the murder of the alleged victims.

21. In reference to the adjudicatory administrative proceeding, the State maintains that on October 21, 1999, the Administrative Tribunal of Arauca declared that the Nation—Ministry of Defense, National Army, was administratively responsible for the death of Oscar Bueno and Jefferson González. It

alleges that the Ministry of Defense issued orders on July 31, 2000 and December 20, 2001 to provide for payments to the relatives of the alleged victims.

22. For these reasons, the State argues that the alleged acts are being addressed in an ongoing proceeding in the ordinary criminal courts, and so domestic remedies have not been exhausted in accordance with Article 46(1) of the American Convention, and the exception claimed by the petitioners does not apply. In this regard, the State argues that since the proceeding in the ordinary criminal courts is in the summary stage, and different procedural activities are being carried out, it cannot be said that there is no adequate remedy under domestic law to clarify the death of the alleged victims and to punish the responsible parties.

23. The State maintains that the criminal proceeding is still in the midst of its investigation; hence, the petition is inadmissible under Article 46(1) of the American Convention. It further contends that the decision of the Adjudicatory Administrative Tribunal compensated the relatives of two of the alleged victims. Thus, the facts do not tend to establish a violation of the American Convention, as established in Article 47(b) of that instrument.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione materiae, ratione personae, ratione temporis* and *ratione loci*

24. In principle, petitioners have standing under Article 44 of the American Convention to lodge petitions before the Commission. The petition indicates that the alleged victims are individuals in respect of whom the Colombian State pledged to respect and guarantee the rights established in the American Convention. With regard to the State, the Commission points out that Colombia has been a state party to the American Convention since July 31, 1977, the date on which it deposited its instrument of ratification. Consequently, the Commission has personal jurisdiction to examine the petition. It also has territorial jurisdiction to examine the petition, since it contains allegations of the violation of rights protected by the American Convention that took place in Colombian territory, a state party to that instrument.

25. The Commission is competent *ratione temporis*, since the obligation to respect and guarantee the rights protected by the American Convention was already in effect for the State on the date that the acts alleged in the petition occurred. Finally, the Commission has subject matter jurisdiction, because the petition refers to possible violations of human rights protected by the American Convention

B. Admissibility requirements

1. Exhaustion of domestic remedies

26. In order for a petition alleging a violation of the provisions of the American Convention to be admissible, it must comply with the requirements established in Article 46(1) of that international instrument. Article 46(1)(a) of the Convention states that to determine the admissibility of a petition or communication lodged in accordance with Articles 44 or 45 of the Convention, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.

27. Article 46(2) of the Convention establishes that the requirement of prior exhaustion of domestic remedies shall not be applicable when: (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

28. The State alleges that the present petition does not meet the requirement of prior exhaustion of the remedies under domestic law stipulated in Article 46(1)(a) of the American Convention since there is a proceeding pending in the ordinary criminal jurisdiction that has been conducted in a diligent manner. The petitioners, on the other hand, allege that the exception stipulated in Article 46(2)(a) of the American Convention applies, because the investigation into the facts was conducted under the military criminal jurisdiction.

29. According to the IACHR's Rules of Procedure and its jurisprudence, whenever a state alleges failure to exhaust domestic remedies on the part of the petitioner, it has the burden of demonstrating that the remedies that were not exhausted were "adequate" to rectify the alleged violation. In other words, these remedies within the domestic legal system must function effectively to protect against the infringed legal situation.

30. In view of the allegations of the parties, the first step is to clarify the domestic remedies that must be exhausted in this case, in the light of the jurisprudence of the inter-American system. Precedents established by the Commission indicate that whenever a crime prosecutable by law is committed, the State has the obligation to advance and expedite criminal proceedings.³ Likewise, the Court has stated that conducting an *ex officio* investigation is a fundamental and determining element for guaranteeing and protecting certain rights affected in these situations.⁴

31. Thus, in such cases, the criminal proceeding in the ordinary courts is the appropriate way to clarify the facts, pass judgment on the responsible parties, and establish the corresponding penal sanctions, in addition to providing for other types of monetary reparations. The Commission notes that the facts set forth by the petitioners in relation to the alleged extrajudicial execution of Oscar Orlando Bueno Bonnet, Jean Carlo Cavarique, and Jefferson González Oquendo are considered as criminal acts prosecutable by law, and that the State itself has the responsibility to investigate and judge such acts.

32. The Commission also observes that, as a general rule, a criminal investigation must be conducted promptly, to protect the interests of the victims, preserve the evidence, and even safeguard the

³ IACHR, Report No. 52/97, *Arges Sequeira Mangas*, February 18, 1998, para. 96; and Report No. 2/10, *Fredy Marcelo Núñez Naranjo et al.*, March 15, 2010, para. 29.

⁴ I/A Court H.R., *Case of Manuel Cepeda Vargas v Colombia*. Preliminary Objections, Merits and Reparations, Judgment of May 26, 2010. Series C No. 213, para. 117; *Case of Radilla Pacheco v Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para. 143; and, *Case of the Pueblo Bello Massacre v Colombia*. Merits, Reparations, and Costs. Judgment of January 31, 2006. Series C No. 140, para. 145;

rights of any person who might be regarded as a suspect in the context of said investigation.⁵ Moreover, since its earliest judgments, the Inter-American Court has found that although any criminal investigation must comply with a series of legal requirements, the rule of prior exhaustion of domestic remedies should not lead to a situation in which international intervention in support of the victims is delayed to the point that it is useless.⁶

33. In the case in point, after the events of January 10, 1997, an investigation was opened in the military criminal courts and was closed on March 5, 2003 by the Military Superior Court. On February 26, 2007, the Military Criminal Prosecutor's Office 20 sent the case file to the UNDH, which issued an order to open a prior investigation on July 31, 2007. On September 1, 2008, the investigation was reassigned to UNDH Prosecutor's Office 72.

34. The Commission has repeatedly determined that the military courts are not an appropriate forum and thus do not provide an adequate remedy for investigating, judging, and punishing violations of human rights established in the American Convention that are allegedly committed by law enforcement personnel.⁷ The same line of reasoning has been systematically applied by other relevant human rights organizations.⁸

35. The IACHR notes that more than thirteen years have lapsed since the acts in question, that in July 2007, more than ten years after the fact, the investigation was sent to the ordinary courts, the appropriate forum for clarifying the murder of three civilians, and that said investigation is still pending. Regardless of the appropriateness of the remedies used since 2007 to establish the individual liability of the persons implicated, the delay caused while the process was still pending in the military criminal court implies an unwarranted delay according to the terms of Article 46(2)(c) of the American Convention; consequently, the petitioners should be exempt from the requirement to exhaust said remedies before seeking protection through recourse to the inter-American system.

36. As for other remedies referred to by the State, the Commission has found previously that decisions issued in disciplinary and administrative jurisdictions do not meet the requirements established in the Convention. The disciplinary jurisdiction is not a sufficient forum for judging, punishing, and compensating for the consequences of human rights violations. The adjudicatory administrative jurisdiction is a mechanism to ensure supervision of the State's administrative activities, and it allows only for compensation for damages caused by abuse of authority. Consequently, in a case such as this one, it is not necessary to exhaust these remedies before resorting to the inter-American system.⁹

37. Invoking the exceptions to the rule of exhaustion of domestic remedies provided for in Article 46(2) of the Convention is closely linked to determination of possible violations of certain rights established in it, such as judicial guarantees and protection. However, Article 46(2), by its nature and purposes, is a norm whose content is independent of the substantive norms of the American Convention. As a result, determination of whether the exceptions to the rule of exhaustion of domestic remedies are applicable to the case in question must be done in advance, and separately from the analysis of the merits of the case, since it relies on a standard of evaluation that is different from the one used to determine a possible violation of Articles 8 and 25 of the American Convention. It is important to clarify

⁵ IACHR, Report No. 87/06, *Carlos Alberto Valbuena and Luis Alfonso Hamburger Diazgranados*, October 21, 2006, para. 25; Report No. 70/09, *José Rusbell Lara*, August 5, 2009, para. 31; and, Report No. 15/09, *Massacre and Forced Displacement of los Montes de María*, March 19, 2009.

⁶ I/A Court H.R., *Case of Velásquez Rodríguez v Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 93.

⁷ IACHR, Report No. 47/08, *Luis Gonzalo "Richard" Vélez Restrepo and Family*, July 24, 2008, para. 74; also see IACHR, *Third Report on the Human Rights Situation in Colombia* (1999), p. 175; *Second Report on the Human Rights Situation in Colombia* (1993), p. 246; *Report on the Human Rights Situation in Brazil* (1997), pp. 40-42.

⁸ See UN Doc. E/CN.4/Sub.2/2000/44, *Administration of justice by military courts and other special jurisdictions*, August 15, 2000, para. 30; and, *1995 Report, Special Rapporteur on Torture*. UN Doc. E/CN.4/1995/34, January 2, 1995, para. 76(g).

⁹ IACHR, Report No. 74/07, *José Antonio Romero Cruz, Rolando Ordoñez Álvarez, and Norberto Hernández*, October 15, 2007, para. 34.

that the causes and effects that prevented exhaustion of domestic remedies will be analyzed in the report adopted by the Commission on the merits of the case, in order to determine if there were violations of the American Convention.

2. Deadline for filing a petition with the Commission

38. The American Convention establishes that in order for the Commission to find a petition to be admissible, it must be lodged within six months of the date on which the alleged victim was notified of the final decision. In the complaint in question, the IACHR has established that application of the exception to exhaustion of domestic remedies pursuant to Article 46(2)(c) of the American Convention applies. In this regard, Article 32 of the Commission's Rules of Procedure establishes that in cases in which the exceptions to prior exhaustion of domestic remedies are applicable, the petition must be lodged within a reasonable period of time, as determined by the Commission. For that purpose, the Commission will consider the date on which the alleged violation of rights occurred and the circumstances of each case.

39. In the present case, the petition was received on March 9, 1998, the alleged acts that are the subject of the complaint began on January 10, 1997, and their effects in terms of the alleged failure to administer justice have extended to this day. Therefore, in view of the circumstances and the characteristics of this case, the Commission considers that the petition was lodged within a reasonable period of time and that the admissibility requirement referring to the deadline for filing has been satisfied.

3. Duplication of procedures and *res judicata*

40. The case records do not contain any information that would lead one to determine that this case is pending other international settlement procedures or that it replicates a petition already examined by this Commission or another international organization. Therefore, the IACHR concludes that the provisions of Articles 46(1)(d) and 47(d) of the Convention are not applicable.

4. Characterization of the alleged facts

41. In view of the elements of fact and of law presented by the parties and the nature of the matter it has been asked to review, the IACHR finds that in the present case, it must determine whether the allegations of the petitioners regarding the presumed violation of the right to life, the right to humane treatment, the right to judicial protection, and the right to a fair trial, to the detriment of Oscar Orlando Bueno Bonnet, Jefferson González Oquendo and the alleged child, Jean Carlo Cavarique, could characterize violations of the rights protected by Articles 4, 5, 8, and 25, considered in accordance with Article 1(1), of the American Convention.

42. The Commission also considers that the allegations of the petitioners regarding the lack of access to the file of the disciplinary investigative proceedings initiated for presumed human rights violations, which was archived in 2002 (see *supra* III A), could characterize a violation of the right to access to information protected by Article 13, considered in conjunction with Article 1(1), of the American Convention, to the detriment of the relatives of the alleged victims.

43. In addition, the Commission notes that the petitioners alleged that Jean Carlo Cavarique was 17 years old at the time of the acts. The State, for its part, did not address this point. The information available in the case file contains inaccuracies regarding the precise determination of the age of the alleged victim. On this point, it is appropriate to recall that both the Court and the Commission have stated that the rights of the child must be safeguarded; both because of the fact that they are human beings and because of their special situation, and so special protective measures should be adopted. Therefore, the Commission considers that it is important to verify the age of Jean Carlo Cavarique during the merits stage of the case, and to examine the possible violation of Article 19 of the American

Convention to his detriment, in light of the United Nations Convention on the Rights of the Child, in accordance with the concept of *corpus juris*.¹⁰

44. In application of the principle of *iura novit curia*, the IACHR considers that the facts could characterize a violation of Article 5 of the American Convention, to the detriment of the relatives of the alleged victims¹¹. Since these aspects of the petition are not manifestly groundless or out of order, the Commission considers that the requirements established in Articles 47(b) and (c) of the American Convention have been met.

V. CONCLUSIONS

45. The Commission concludes that it is competent to examine the complaints presented by the petitioners regarding the alleged violation of Articles 4, 5, 8, 13, 19, and 25, considered in conjunction with Article 1.1, of the American Convention. It further concludes that the complaint is inadmissible insofar as the alleged violation of Article 13 of the American Convention is concerned.

46. Based on the factual and legal arguments set forth in this report, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare this case admissible with regard to Articles 4, 5, 8, 13, 19, and 25, considered in conjunction with Article 1.1 of the American Convention on Human Rights.
2. To notify the parties of this decision.
3. To continue with an analysis of the merits of the case.
4. To publish this decision and include it in its Annual Report to be presented to the OAS General Assembly.

¹⁰ American Convention, Article 29, Article 29. Restrictions regarding Interpretation: "No provision of this Convention shall be interpreted as: [...] (b) restricting the enjoyment or exercise of any right of freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party [...]. IACHR, Report No. 51/10 *Massacres of Tibú*, March 18, 2010, para. 127.

¹¹ Pursuant to Article 35.1 of the Rules of the Inter-American Court of Human Rights and its recent jurisprudence, the IACHR includes as victims the relatives of the alleged victims. See I/A Court H.R., *Case of Radilla Pacheco v Mexico*. Judgment of November 23, 2009. Series C No. 209, paras 161 and 162. *Cfr. Case of Castillo Páez v Peru*. Judgment of November 3, 1997. Series C No. 34, fourth operative paragraph; *Case of Kawas Fernández v Honduras*. Judgment of April 3, 2009. Series C No. 196, para. 128, and *Case of Anzualdo Castro v Peru*. Judgment of September 22, 2009. Series C No. 202, para. 105.

Done and signed in the city of Washington, D.C., on the 23rd day of the month of October 2010.
(Signed): Felipe González, President; Dinah Shelton, Second Vice-President; Luz Patricia Mejía Guerrero, María Silvia Guillén, and José de Jesús Orozco Henríquez, members of the Commission.